

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

STEPHEN MICHAEL WEST,

Petitioner

v.

RICKY BELL, Warden,

Respondent

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No. 3:01-cv-91

Varlan/Shirley

Death Penalty

Execution Scheduled

November 9, 2010

Application for Certificate of Appealability

Comes now Petitioner, Stephen Michael West, through undersigned counsel, and applies for a Certificate of Appealability (“COA”) as to the determinations in the Court’s Order of October 27, 2010 (R. 216), that Mr. West’s Motion for Relief from Judgment is a successor petition and that, to the extent it is a Motion filed pursuant to FED. R. CIV. P. 60, it is without merit.

Sixth Circuit Rule 22(a) provides that an application for certificate of appealability may be filed in the Sixth Circuit only after “denied by the district court.” Further, the rule in the Sixth Circuit is that the grant of a certificate of appealability is a jurisdictional prerequisite to appealing the denial of a Motion for Relief from Judgment. *Johnson v. Bell*, 605 F.3d 333, 335 (6th Cir. 2010). Accordingly, Mr. West applies to this Court first for a Certificate of Appealability.

To obtain a COA, a habeas petitioner must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The petitioner “need not show that he should prevail on the merits.” *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Instead, the Supreme Court instructs:

[t]he COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claim. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

A claim denied by the district court on its merits warrants issuance of a COA when it presents a "question of some substance." Questions of some substance include those (a) that are "debatable among jurists of reason;" (b) "that a court could resolve in a different manner;" (c) that are "adequate to deserve encouragement to proceed further;" or (d) that are not "squarely foreclosed by statute, rule or authoritative court decision, or ... [that are not] lacking any factual basis in the record." *Barefoot*, 463 U.S. at 893 n.4, 894; *see also Slack v. McDaniel*, 529 U.S. 473 (2000).

A claim denied on procedural grounds "without reaching the prisoner's underlying constitutional claim," warrants a COA when:

jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack, 529 U.S. at 478.

As is shown within, Mr. West meets the above-cited standards for application of the certificate of appealability.

Mr. West seeks an application to appeal this Court's determination that his Motion or Relief from Judgment is in essence a successor petition. Mr. West presented

the following allegations in his habeas petition in district court:

- whether trial counsel was ineffective for failing to present evidence about Mr. West being born in a mental hospital and how this strongly suggests a genetic tendency to succumb to significant mental illness, a high likelihood of emotional deprivation in the critical bonding phase of his life,¹
- whether trial counsel was ineffective for failing to present the testimony of Mr. West's sister, Debra West Harless, that West was physically abused as a child,²
- whether trial counsel was ineffective for failing to present the testimony of West's former wife, Karen West Bryant, about West describing to her the abuse he suffered,³
- whether trial counsel was ineffective for failing to present the testimony of his father, Vestor West, admitting that he severely abused Mr. West,⁴
- whether trial counsel was ineffective for failing to present testimony of Mr. West's manager at McDonald's that Ronnie Martin was hostile and

¹Affidavit of Dr. Keith Caruso, dated February 23, 2001 (Exhibit 1 to Motion for Relief); Medical Record from Community Hospital confirming West was born in a mental institute (Exhibit 2 to Motion for Relief). See page 85, n. 23, of the Court's Memorandum Opinion, R. 188.

²Affidavit of Debra West Harless, dated December 31, 1998 (Exhibit 3 to Motion for Relief). See page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

³Affidavit of Karen West Bryant, dated December 18, 2001 (Exhibit 4 to Motion for Relief). See page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

⁴Affidavit of Vestor West, dated December 31, 1998 (Exhibit 5 to Motion for Relief). See page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

aggressive while Mr. West was more passive,⁵ and

- whether trial counsel was ineffective for failing to present proof that Mr. West suffered repeated childhood abuse which caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder.⁶

This Court refused to review these claims, finding them unexhausted. R. 188, p. 85, n. 23. Mr. West's Motion for Relief from Judgment seeks to reopen his habeas case because intervening legal developments demonstrate this Court's failure to review these claims renders the proceedings defective. *Gonzalez v. Crosby*, 545 U.S. 524 (2005). This Court determined Mr. West's Motion for Relief was a successor application because his argument "would inextricably lead to a re-examination of the merits of petitioner's prior claim in his habeas petition." R. 216, p. 7 of 13. A COA on this determination is warranted because jurists of reason would find it debatable whether this Court's procedural ruling is correct. In *Gonzalez v. Crosby*, 545 U.S. 524, 532, n.4 (2005), the Supreme Court specifically held that a petitioner may "assert[] that a previous ruling which precluded a merits determination was in error—for example a

⁵Affidavit of Patty Rutherford, dated February 11, 2002 (Exhibit 6 to Motion for Relief). See page 85, n. 23 of the Court's Memorandum Opinion, R. 188.

⁶Report of Claudia R. Coleman, Ph.D., dated November 7, 2001 (Exhibit 7 to Motion for Relief); Report of Richard G. Dudley, Jr., M.D. dated February 22, 2002 (Exhibit 8 to Motion for Relief). See page 85, n.23 of the Court's Memorandum Opinion, R. 188. Affidavit of Pablo Stewart, M.D. dated December 13, 2002 (Exhibit 9 to Motion for Relief), which was attached to Petitioner's Fourth Motion to Expand the Record filed December 19, 2002 (R. 166), granted August 21, 2003 (R. 181). Dr. Stewart's affidavit was presented to this Court. See Motion to Expand, *supra*, and Order granting same, *supra*. His affidavit was not specifically discussed in this Court's Memorandum dismissing Mr. West's petition. Implicit in the Court's Memorandum Opinion is the holding that this evidence was likewise barred by 2254(e)(2). See R. 188, p. 85-88.

denial for such reasons as *failure to exhaust*, procedural default, or statute of limitations bar.” (Emphasis added). Mr. West alleges this Court’s ruling that failure to exhaust precluded merits determinations of the above-enumerated claims was in error. Accordingly, jurists of reason could easily determine his Motion for Relief from Judgment was in fact a true 60(b) motion. *See also Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007); *Ballentine v. Thaler*, 609 F.3d 729 (5th Cir. 2010) (both holding that a 60(b) Motion was appropriate where the district court erroneously held certain sentencing claims were unexhausted).

Mr. West also seeks a COA on the determination that to the extent his Motion is a true 60(b), it is without merit. This Court concluded that allegations of legal error are not cognizable under RULE 60(b)(6). R. 216, p. 10 of 13. But jurists of reason could easily find this conclusion debatable. In *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009), the Sixth Circuit held that a change in Tennessee’s law on exhaustion qualified as an exceptional circumstance. Jurists of reason could conclude Mr. West’s allegation that intervening caselaw showing that this Court misapprehended the interaction between 2254(d) and (e) qualifies as extraordinary circumstance warranting reopening of the habeas petition. Jurists of reason could also conclude his claims are extraordinary because he faces execution despite the fact that no court has ruled on the merits of the above-listed compelling claims. *Thompson*, 580 F.3d at 444. Further, given that Mr. West filed his Motion for Relief within months of the Supreme Court’s grant of certiorari in *Pinholster* (2010 WL 3183845), reasonable jurists could conclude Mr. West filed the Motion timely. *Thompson*, 580 F.3d at 444.

Accordingly, Mr. West seeks a COA on the above listed issues.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010, the foregoing Application for Certificate of Appealability was filed electronically. Notice electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/Stephen A. Ferrell